Filed 2/23/09 Broker v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JEFFREY W. BROKER et al., Petitioners, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; MICHAEL SANFORD KOGAN, Real Party in Interest.	G041240 (Super. Ct. No. 07CC06070) O P I N I O N

Original proceeding; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, James Di Cesare, Judge. Petition granted.

Catanzarite Law Corporation, Kenneth J. Catanzarite and Richard Vergel de Dios for Petitioners.

Lurie, Zepeda, Schmalz & Hogan, Steven L. Hogan and Lawrence J. Imel for Real Party in Interest.

FACTS AND PROCEDURAL BACKGROUND

1. The Complaint

Larry and Susan Gersten sued Michael Sanford Kogan and Kevin James Lamb for legal malpractice. The complaint alleges that in 1994 one Marshall P. Gavin obtained an arbitration award of $1,730,989 against Larry Gersten and others and judgment was entered on the award. The Gerstens employed Kogan to protect their assets against the judgment. Almost a year later, the Gerstens asked Kogan to prepare a bankruptcy petition on their behalf. The petition was filed by Kogan and showed Lamb as attorney of record as well. Several years later the bankruptcy court allowed Gavin's unsecured claim in the amount of $1,773,541.43 but rejected his claim based on the recordation of a notice of levy against plaintiffs' residence.

Thereafter, the trustee in bankruptcy sought to levy on the Gerstens' interest in the residence. The Gerstens ultimately settled this claim for $550,000. The complaint alleges Kogan and Lamb were negligent in failing to object to Gavin's claim on the ground it was a general unsecured claim and in failing to obtain an order requiring the trustee in bankruptcy to abandon the Gerstens' residence. Based on these allegations the Gerstens seek to recover from Kogan and Lamb the $550,000 they paid to the bankruptcy estate.

2. Kogan's Cross-complaint

Kogan filed a cross-complaint for indemnity against Jeffrey W. Broker and Broker & Associates Professional Corporation (petitioners). It alleges that in November 1995, Lamb filed a bankruptcy petition on behalf of the Gerstens, listing a number of assets, including the Gerstens' residence with a value of $500,000, subject to a secured

claim of $453,768 and a homestead exemption of $75,000. In February 1996, Kogan appeared as counsel for the Gerstens when the trustee in the Gerstens' bankruptcy filed objections to exemptions claimed by the Gerstens relating to various pension plans. In April, the bankruptcy court partially sustained the trustee's objection to the extent of $129,138 in an IRA account. The Gerstens, through Kogan, appealed this order and eventually settled the appeal by paying $60,000 to the trustee in bankruptcy.

In November, Gavin filed a secured claim against the Gerstens' residence in the amount of almost $1.8 millon. The Gerstens objected to this claim on grounds Gavin had failed to perfect his lien on the residence and the claim was therefore unsecured. The cross-complaint is silent as to who represented the Gerstens in filing these objections, but shortly after this, the Gerstens substituted petitioners as their attorney in the bankruptcy proceedings. After the trustee in bankruptcy objected to Gavin's proof of claim, petitioners failed to object to the claim on grounds that it should be rejected as either a secured or an unsecured claim.

In March 2007, the Gerstens filed an administrative claim requesting they be paid $752,378 for payments they made for their residence during the preceding 10-year period. Rather than pursue this claim, the Gerstens settled with the trustee in bankruptcy by paying the estate.

Kogan's indemnity claim alleges petitioners' negligence, which caused the Gerstens' loss, consists of failing to object to the Gavin proof of claim on two grounds: (1) the claim was filed as a secured claim and Gavin had no claim against the residence; and (2) Gavin's judgment was expired because he had failed to renew it.

3. Broker's Demurrer

Petitioners demurred to the cross-complaint on grounds that predecessor counsel sued by a former client for legal malpractice may not assert a cause of action against the successor attorney for contribution or indemnity. The trial court overruled the

demurrer. In its tentative ruling the court stated: "Pursuant to Mosser (*sic*) 28 Cal.4th 274, 284, there is no absolute bar on indemnity actions between predecessor and successor attorneys where predecessor attorney is sued for malpractice. Rather, cases should be decided on a case by case basis depending upon whether (1) a conflict is created between the successor attorney's duty to his client and his own self interest and (2) whether attorney-client communications may have to be divulged in successor attorney's defense. Petitioners fail[] to establish that either policy consideration is implicated in this matter at this time.[]"

DISCUSSION

1. The Musser Case and Its Ancestry

In *Musser v. Provencher* (2002) 28 Cal.4th 274 (*Musser*), the California Supreme Court considered whether concurrent counsel or co-counsel may sue one another for indemnification for malpractice damages. The court first set out the general rule announced in *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 608, "that under the common law equitable indemnity doctrine a concurrent tortfeasor may obtain partial indemnity from cotortfeasors on a comparative fault basis." (*Musser, supra,* 28 Cal.4th at p. 280.) But the court noted there were significant exceptions to this rule and that "'irrespective of the equities between or among multiple tortfeasors, the right is subject to qualification; and countervailing considerations may limit recovery.'" (*Ibid.*) The *Musser* court then listed, with apparent approval, five Court of Appeal decisions holding that indemnification for legal malpractice damages was barred where a predecessor attorney was seeking indemnification from his successor. (*Id*. at pp. 280-281.)

Musser explained that this exception to the rule of *American Motorcycle Assn. v. Superior Court* has been justified on the basis of three policy considerations:

First, "*avoiding conflicts of interest* between attorney and client: The threat of an indemnification action would arguably create a conflict of interest between the successor attorney and the client because the greater the award the successor attorney managed to obtain for the client in the malpractice action, the greater the exposure to the predecessor attorney in the indemnification action. [Citation.]" (*Musser, supra,* 28 Cal.4th at p. 281.) Second, "*protecting confidentiality* of attorney-client communications: In order to defend against an indemnification action, the successor attorney might be tempted to compromise the confidentiality of communications with the client. [Citation.]" (*Ibid.;* fn. omitted.) Third, "*protecting the right of clients freely to choose their attorneys*: The threat of an indemnification action might deter the successor attorney from representing the client in the malpractice action because the successor attorney would be handicapped in defending against the indemnification claim by his duty to maintain the confidentiality of the client communications. [Citation.]" (*Id.* at p. 281, fn. 3.)

Musser proceeded to cite several earlier Court of Appeal decisions relating to indemnity rights between counsel who *concurrently* represented the same client. (*Musser, supra,* 28 Cal.4th at pp. 281-284.) In doing so, it focused primarily on *Kroll & Tract v. Paris & Paris* (1999) 72 Cal.App.4th 1537 (*Kroll*). In *Kroll*, the plaintiff, after losing a suit, sued the lawyers assigned by its insurer to defend it. These lawyers in turn cross-complained for equitable indemnity against lawyers retained directly by the insured plaintiff and who had associated in the defense of the underlying suit. This court affirmed a decision by the trial court barring the cross-complaint primarily because of the dilemma posed by the attorney-client privilege. (*Kroll, supra,* 72 Cal.App.4th at pp. 1544-1545.)

2. The Bar Against Predecessor Attorneys Seeking Indemnity From Their Successors

We noted that *Musser* listed five Court of Appeal decisions holding that indemnification for legal malpractice damages was barred where a predecessor attorney

was seeking indemnification from his successor. (*Musser, supra*, 28 Cal.4th at p. 280-281.) The cited cases are *Held v. Arant* (1977) 67 Cal.App.3d 748; *Gibson, Dunn & Crutcher v. Superior Court* (1979) 94 Cal.App.3d 347; *Goldfisher v. Superior Court* (1982) 133 Cal.App.3d 12; *Holland v. Thacher* (1988) 199 Cal.App.3d 924; and *Austin v. Superior Court* (1999) 72 Cal.App.4th 1126. (*Musser, supra,* 28 Cal.4th at p. 280-281.) Here also the cross-complaint is by a predecessor attorney seeking indemnification from his successor. But, there is a difference between the situation of the two sets of lawyers here, which distinguishes the facts of this case from the cases apparently approved in *Musser*.

In each of those cases, the defendant-lawyer who was sued for legal malpractice sought to cross-complain against the lawyer representing plaintiff in the very malpractice action in which the cross-complaint was filed. Here Kogan is a defendant in an action for legal malpractice. But his cross-complaint is not directed at the lawyers currently representing plaintiffs, the Gerstens, in that action as successors to Kogan but rather at lawyers who previously represented them in the bankruptcy proceeding in which the alleged malpractice occurred. Should this result in a different ruling?

To answer this query, we must return to the justifications for the exception precluding cross-complaints for indemnity in legal malpractice actions against successor attorneys. As *Musser* noted, these are: (1) "*avoiding conflicts of interest* between attorney and client"; (2) "*protecting confidentiality* of attorney-client communications"; and (3) "*protecting the right of clients freely to choose their attorneys*." (*Musser, supra*, 28 Cal.4th at p. 281 & fn. 3.) Not all of these justifications apply only in the context of cross-complaints against the lawyer who represents the plaintiff in the malpractice action. True, concern for a conflict of interest is different. Where the cross-defendant attorney represents plaintiff in the legal malpractice action, a conflict of interest arises because "the greater the award the successor attorney managed to obtain for the client in the malpractice action, the greater the exposure to the predecessor attorney in the

indemnification action. [Citation.]" (*Id.* at p 281.) The same is not true here. But the two remaining considerations apply whether or not the cross-complaining lawyer sues an attorney who now represents the plaintiff in the legal malpractice action or another attorney who was retained to complete the task cross-complainant allegedly mishandled.

The potential for such a cross-claim might dissuade a lawyer from taking over a case where the first lawyer allegedly committed malpractice, thus infringing on the client's right to freely choose a lawyer. And how can petitioners effectively defend themselves against Kogan's indemnity claim while they are prohibited from disclosing the facts, the directions and the tactical considerations communicated to them by their clients in connection with their handling of the bankruptcy matter? These facts demonstrate the need for writ review. Kogan states in his answer to the writ petition "[p]etitioners have failed to establish that they will suffer irreparable harm if the instant Writ Petition is denied. Petitioners' right to seek appellate review of the order overruling their demurrer may be pursued following a judgment in the underlying proceedings, if necessary." Not so. This case represents the very situation where it would not be possible to put Humpty Dumpty back together again at the time of an appeal.

Kogan also suggests that we should deny the petition because "[t]he Gerstens may decide not to assert the attorney-client privilege with respect to [p]etitioners." But we should not be required to speculate on this issue. The same argument might have been made in each of the cases involving claims for indemnification by predecessor attorneys against successor attorneys. Nor do we agree with Kogan that we should wait until he propounds discovery to the Gerstens and petitioners. The question is not whether the Gerstens will waive the attorney-client privilege in response to Kogan's inquiries, but rather whether petitioners would be limited in their ability to defend themselves against Kogan's claims absent such a waiver.

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing the trial court to vacate its order of October 30, 2008 overruling petitioner's demurrer to the cross-complaint and issuing a new order sustaining the demurrer. Petitioners shall recover their costs.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.